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No. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,

Petitioners,

VS.

EXXON CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE

EUGENE J. SILVA*
JOHN M. MACIEJCZYK
VINSON & ELKINS
First City Tower
1001 Fannin
Houston, Texas 77002-6760
713/651-2014

Attorneys for Amici Curiae,

International Association of Drilling Contractors and Offshore Marine Service Association

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**Counsel of Record*

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BRIEF OF AMICI CURIAE

CERTIFICATION OF CONSENT

This brief is filed with permission of the parties under S. CT. R. 36.2. The required letters of consent have been filed with the Clerk of this Court.

IDENTIFICATION OF SUPPORTED PARTY

Amici herein file this brief in support of the Respondents.

INTEREST OF AMICI CURIAE

The International Association of Drilling Contractors ("IADC") is an organization of approximately 560 oil and gas

drilling contractors throughout the world. Headquartered in Houston, Texas, the Association is comprised of members from 32 foreign countries who employ thousands of workers, of almost every nationality, to conduct oil and gas drilling operations. The Offshore Marine Service Association ("OMSA") represents the interests of vessel owners and operators providing vessel support and transportation services to all phases of the offshore energy industry. OMSA has over 100 member corporations located on all coasts of the United States, operating over 2,000 American flag vessels.

The IADC and OMSA are interested in this litigation because of the potential adverse effect this Court's ruling could have on their members who employ non-Americans as "seamen" aboard vessels engaged in the exploration, development and production of offshore mineral or energy resources. A decision to reverse the United States Court of Appeals for the Fifth Circuit could eviscerate the effect of a recently enacted federal statute directly on point. This statute, section 688(b) of the Jones Act, was passed by Congress to protect American offshore drilling contractors and support organizations from the adverse effect of lawsuits instituted by foreign offshore oil workers in the courts of the United States.

SUMMARY OF ARGUMENT

On December 29, 1982, Congress enacted Public Law 97-389. Title V of that legislation contained a revision to section 20 of the Merchant Marine Act of 1920, 41 Stat. 1007 (the "Jones Act") (codified as amended at 46 U.S.C. § 688 (1982)). Section 688 was amended to add subsection (b)(1) which essentially provided that a foreign seaman may not maintain an action for injury or death in an American court under the maritime laws of this nation if the injury occurred while that seaman was working in the offshore oil industry, within the territorial waters of a nation other than the United States. 46 U.S.C. § 688(b)(1).

The amendment also provided that section 688(b) would not affect actions arising before its enactment date. Therefore,

section 688(b) is not directly at issue in this appeal. However, there is a clear danger that a ruling by this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit could undercut Congress' intent in passing section 688(b).

Petitioners argue that the *forum non conveniens* ruling by the district court should not be binding on Texas state courts because it is merely a procedural, not a substantive, decision. If this Court reverses on that basis, the same argument could be made that section 688(b) is merely a codification of federal procedural law, and is therefore not binding on state courts that are otherwise required to follow the mandates of federal maritime law when entertaining suits brought by seamen under the "saving to suitors" clause of 28 U.S.C. § 1333 (1982).

When it enacted section 688(b), Congress specifically considered both the uniformity requirements of the general maritime law and the impact of the provision on foreign relations. It was clearly exercising its prerogative to legislate in these purely federal arenas. This Court should look to the guidance of Congress in enacting section 688(b) when deciding this appeal. The decision of the Court of Appeals should be upheld in order to preserve, and not undercut, the intent of Congress as manifested in its passage of section 688(b).

ARGUMENT

I.

REVERSING THE LOWER COURT'S RULING ON THE BASIS ASSERTED BY PETITIONERS COULD HAVE A DRAMATIC, ADVERSE IMPACT UPON FUTURE STATE COURT APPLICATION OF 46 U.S.C. § 688(b) IN SIMILAR ACTIONS

On December 29, 1982, Congress enacted the following amendment to the original section 20 of the Jones Act:

> (b) Limitation for certain aliens; applicability in lieu of other remedies
>
> (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the

United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by (a) vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. . . .

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or
>
> (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Act of December 29, 1982, (hereinafter "the Act") Pub. L. No. 97-389, Title V, § 503(a), 96 Stat. 1949, 1955 (1982) (codified at 46 U.S.C. § 688(b)(1982)).

The Act also specified that "[t]he amendment made by this section . . . does not apply to any action arising out of an incident that occurred before the date of enactment of this section [Dec. 29, 1982]." *Id.* § 503(b). Because Petitioner's decedent, Leong Chong, died in 1977, prior to the effective date of section 688(b), this provision does not control the outcome of this appeal. However, there is a high risk that a reversal of

the Fifth Circuit's decision on the basis urged by Petitioners, could have a dramatic, negative impact on the application of section 688(b) in the future.

Under this Court's holding in a series of cases, the most recent of which is *Offshore Logistics, Inc. v. Tallentire*, ... U.S. ....., 106 S.Ct. 2485 (1986), state courts entertaining maritime actions under the "saving to suitors" clause of 28 U.S.C. § 1333 (1982), are constrained by the "so called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing maritime standards." *Id.* at 2495. Although the Fifth Circuit did not directly address this procedure/substance dichotomy below, implicit in its decision is the notion that a *forum non conveniens* dismissal, at least in a maritime setting, is substantive. *See Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 324 (5th Cir. 1987) (rejecting a Louisiana State Court of Appeals decision that *forum non conveniens* is "procedural").

Petitioners argue that the Court of Appeals erred, and that a forum non conveniens dismissal is "procedural" in nature:

> Although Judge Gee properly recognized . . . this Court's holding in [*Tallentire*] he mistakenly applied that principle to the procedural concerns implicated by the *forum non conveniens* doctrine. This reflects a substantial error of analysis; the procedural interests of the adjudicating forum are at root in the substantive/procedural law distinction in both the *Erie* and reverse-*Erie* context. Thus, even when a particular body of substantive law must govern a cause of action, the forum applying that substantive law is fully entitled to use its own procedural rules, including local principles of *forum non conveniens*.

Br. for Petitioners at 34-35.

Should this Court agree with Petitioners that *forum non conveniens* is purely a procedural matter, and therefore under *Tallentire* not binding on state courts under the reverse-*Erie* doctrine, this holding could be used by litigants in subsequent state court actions to eviscerate the effect of section 688(b).

Section 688(b) is a codification of congressional policy in the application of federal general maritime *forum non con-*

veniens principles to foreign offshore workers. There are numerous references in the legislative history of the enacting legislation to traditional choice of law/*forum non conveniens* factors. For example, the House report on the Act states:

> [Section 688(b)] will establish a jurisdictional rule .... The worker in the offshore petroleum industry is not engaged in a maritime activity that takes him into waters controlled by a number of different nations or no nation. Rather, he is involved in an activity under the clear jurisdiction of one nation. In light of this relationship, the place of injury is an appropriate forum in which to seek redress. The rationale underlying the application of "the law of the flag" to maritime workers does not exist for foreign offshore energy production workers whose activities are closely related to land-based petroleum technology and are not of a true maritime nature.
>
> ... Trial at the place of injury will ensure greater ease of access to sources of proof, proximity of potential witnesses, and ability to join additional parties who are not subject to suit in the U.S. The Bill should discourage forum shopping and decrease U.S. court expenses and backlogs.

H.R. REP. No. 863, 97th Cong., 2d Sess. at 4 (1982). The report also emphasized that foreign workers affected by the Act are not without remedies in another forum:

> Based on three days of hearings, it is clear that the nations granting offshore oil or mineral exploration rights have procedures to compensate a worker injured in an offshore operation. Those nations not having such procedures can establish programs and require U.S. companies operating off their coast to participate in those programs.
>
> Though it seems unlikely that a foreign worker would not have a remedy available in either his home nation or the nation exercising jurisdiction over the place of injury, the legislation provides that if this should occur, the worker would not be prevented by this Act from bringing a Jones Act suit in the United States.

H.R. REP. 97-863, *supra* at 5-6. *See also, e.g., Maritime Torts: Hearings on H.R. 4863 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries,* 97th Cong. 2d Sess. 74-77, 82-83 (1982).

Indeed, the Court of Appeals noted below that section 688(b) codified federal *forum non conveniens* law:

> The legislative history [of section 688(b)] makes it clear that Congress intended to codify judicial decisions dismissing claims under the Jones Act by foreign offshore workers under the doctrine of *forum non conveniens.*

817 F.2d at 323.

Therefore, the same arguments Petitioners make in this action concerning a *forum non conveniens* dismissal could easily be made in future cases with regard to section 688(b).

It should be noted that Counsel for Petitioners in this appeal opposed the passage of section 688(b), and undoubtedly see this case as a vehicle to undermine its effect. *Hearings, supra* at 112-48 (testimony of B. Musslewhite). The legislative history also contains a reprint of an article in the St. John's, Newfoundland, *St. John's Evening Telegram* that quoted counsel for Petitioners as saying the bill was "chauvinistic and racist and constitutes the rankest discrimination against non-American offshore workers," and urging all Canadians to oppose the legislation. *Hearings, supra* at 198.

II.

REVERSING THE COURT OF APPEALS DECISION WOULD FRUSTRATE THE WILL OF CONGRESS AS EXPRESSED IN SECTION 688(b)

Section 688(b) is a carefully considered modification of American tort law principles as applied in the general maritime law. Congress considered, in depth, both the necessity for uniformity of the general maritime law, and the impact of section 688(b) on relations with our foreign trading partners. There is also evidence that Congress considered it was passing a "substantive" measure. For these reasons, this Court should

look to the policy bases underlying the enactment of section 688(b) for guidance when deciding the instant case, particularly in light of the possible impact its decision will have on the effectiveness of section 688(b) as interpreted by state and federal courts in future cases.

1. Uniformity

The need for uniformity has from our nation's beginning been the express policy underpinning the requirement that federal law be the rule of decision in maritime cases. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 516 (1828). This underlying principal continues today as the central premise of federal maritime law. *See Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 154-55 (1964); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958). In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), stressing the need for uniformity and Congress' role in the formulation of federal maritime law, Justice McReynolds wrote:

> [W]e accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters, and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Id. at 160. This echoed the words Justice Bradley wrote a half-century earlier:

> [T]he Constitution must have referred to a system of [admiralty and maritime] law co-extensive with and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.

The Lottawana, 88 U.S. (21 Wall.) 558, 575 (1874).

Congress has legislated to preserve adequate harmony and promote uniform rules relating to maritime matters with a vengeance, addressing in one form or another subjects as diverse as navigation rules, pollution regulations, dredging and filling operations, the boundaries of coastal states' territorial waters, and remedies for injured longshore and harbor workers, to name but a few efforts. In the Jones Act, Congress provided the exclusive remedy for seamen injured while in the service of their vessel. This Court has held that the Jones Act was "intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States." *Lindgren v. United States*, 281 U.S. 38, 44 (1930).

In 1982, Congress again exercised its power to uniformly administer the substantive federal maritime law, specifically addressing the right of foreign nationals to bring suits under the Jones Act and the general maritime law. The legislative history of section 688(b) clearly reflects Congressional concern for the disparities in *forum non conveniens* decisions rendered by state and federal courts. Section 688(b) was enacted to remedy these discrepancies. In the House Report, the Committee on Merchant Marine and Fisheries commented on the injustice of this lack of uniformity:

> In recent years, a number of our courts have entertained suits under the Jones Act by foreign offshore workers injured while working above the Outer Continental Shelf of a foreign nation. This approach has not been accepted by all Federal Courts, however. As a result, the determination as to whether it is appropriate to commence a suit in the United States depends not on the statutory right granted by the Jones Act but rather on the happenstance of where the suit is instituted or which district judge

hears the case. *The Committee finds that this lack of uniform treatment is unjustified and unreasonable.*

H. R. REP. No. 97-863, *supra* at 3 (emphasis added). Sponsors and supporters of the Act repeatedly referred to the need for uniformity in the general maritime law during both the hearings and floor debates on section 688(b). *See, e.g., Hearings, supra* at 1 ("This legislation seeks to establish uniform jurisdictional rules to guide the courts in their consideration of these actions."), 95-97 (discussing disparity between Texas federal district court *forum non conveniens* rulings), 168 ("Another example of the confusion is the information given this Subcommittee on February 25 about the history of a lawsuit dismissed by one Federal District Court on grounds of *forum non conveniens* being refiled in an adjoining Federal District. [Section 688(b)] would end the existing uneven treatment.") (statement of Rep. Shumway); 128 CONG. REC. at H-7632 (daily ed. Sept. 28, 1982) (statement of Rep. Snyder) ("[T]here has been an uncertain and confusing case law development regarding the offshore industry. [Section 688(b)] is an attempt to establish a uniform approach to considering suits brought by foreign workers ...."), H-7634 (statement of Rep. Hubbard), H-7638 (statement of Rep. Derwinski), H-9453 (daily ed. Dec. 10, 1982) (statement of Rep. Pritchard).

In opening the second day of hearings on the Act, the Merchant Marine Subcommittee Chairman stated that:

> The Jones Act rights of seamen have been extended by some courts to permit suits in U.S. courts by foreign offshore workers. At the February 25 hearing, testimony was presented indicating that the courts have failed to develop a uniform approach in dealing with litigation seeking Jones Act remedies for offshore workers. Sometimes the courts will dismiss these actions on the basis of *forum non conveniens*. In other instances, the courts will entertain the suits. [Section 688(b)] will establish a consistent approach to dealing with cases involving persons engaged in offshore resource recovery.

Hearings, supra at 165 (May 19, 1982).

Section 688(b) was therefore a carefully considered effort by Congress to inject some uniformity into the *forum non conveniens* decisions of federal and state courts. It is a clear expression by Congress of what maritime law should be and how the courts should treat cases brought by foreign offshore workers in this country. This Court should be reluctant to undercut that policy by giving credence to Petitioners' arguments.

2. Foreign Policy

As with maritime matters, the federal government also exercises nearly exclusive control over foreign relations. In fact, this Court has said the area is the sole province of the federal government, where no state may interfere: "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). This power derives from, and is considered by this Court to be, an inherent attribute of sovereignty. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1983); *Burnet v. Brooks*, 288 U.S. 378, 396 (1933).

Congress has a well recognized role in foreign policy. As Justice Felix Frankfurter, writing for this Court in *Perez v. Brownell*, 356 U.S. 44, 57 (1958), stated:

> Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation ... a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations.

In fact, Petitioners themselves recognize that "foreign policy is not a matter set by the judiciary but by the elected representatives of the government." Br. for Petitioners at 36. This is indeed the case, and section 688(b) reflects Congress' policy decision on this issue. As with Congress' concern with

the need for uniformity in the general maritime law, it also carefully considered the impact of section 688(b) on foreign relations. The Committee's report emphasized the sovereignty concerns deemed crucial to foreign relations in *Fong Yue Ting* and *Burnet*:

> The legislation is in accord with customary international law and international agreements in that it recognizes the right of a nation to regulate activity within its territorial waters and in the Outer Continental Shelf adjacent to the coast of that nation. *The present situation whereby domestic United States law is applied to actions and occurrences within the jurisdiction of a sovereign foreign nation is an unwanted application and extraterritorial extension of U.S. law and not in accord with our treaties of friendship and navigation.*

H. R. REP. 97-863, *supra* at 7 (emphasis added).

The remarks of the Chairman of the Subcommittee on Merchant Marine also reflected a concern for the foreign relations impact of section 688(b):

> [Section 688(b)] is based on the axiom of international law that each nation has a right to control activities occurring within its territory. The Outer Continental Shelf Lands Act and a number of multinational treaties recognize the right of a country to establish laws and regulations governing offshore exploration and development on the continental shelf adjacent to that country. The pending legislation establishes that Jones Act suits should not be entertained where a system of compensation has been established by either the nation regulating the offshore activity or the home nation of the injured party.

Hearings, supra at 165-66. *See also Hearings, supra* at 2 ("[Section 688(b)] recognizes that other nations have established rules to govern offshore exploration, production, and development in water under their jurisdiction, *and directs that those laws and regulations should preempt the system of compensation set up by our Nation in the case of foreign citizens.*") (emphasis added).

Congress clearly exercised its law-making prerogative in foreign relations when enacting section 688(b). As Petitioners

argue, courts should look to it for guidance in this area. By enacting section 688(b), Congress made a strong statement that these *forum non conveniens* decisions have a definite foreign relations impact, and it expressed its will as to their proper resolution. This Court should be reluctant to undercut the effect of that statute.

III.

THE PROCEDURAL VERSUS SUBSTANTIVE ARGUMENT URGED BY PETITIONERS IS A FALSE DICHOTOMY RELIED UPON TO OBTAIN A DIFFERENT RESULT IN STATE COURT

Petitioners rely on a "procedure" versus "substance" dichotomy to avoid the district court *forum non conveniens* dismissal. *See* Br. for Petitioners at 34. However, this Court long ago commented on the weakness of such a distinction:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

Guaranty Trust v. York, 326 U.S. 99, 108 (1945). *See also Hanna v. Plumer*, 380 U.S. 460, 469-73 (1965) (reaffirming the distinction between "substance" and "procedure" is inadequate). In fact, this Court has indicated that any test, including the "outcome-determinative test" is inappropriate: "[C]hoices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule." 380 U.S. at 467.

The policies underlying the *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) rule are two-fold; "discouragement of forum shopping and avoidance of inequitable administration of the

laws." *Id.* at 468. An examination of the legislative history of section 688(b) shows that the first of these policy considerations, forum shopping, seems to have been a dominant consideration in its passage. *See, e.g.*, H.R. REP. 97-863, *supra* at 4; *Hearings, supra* at 30, 32-33, 197-200.

The second *Erie* consideration, "inequitable administration of the laws," has also been strongly emphasized by this Court. As noted in *Guaranty Trust,* "the intent of [*Erie*] was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same .... *The nub of the policy ... is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.*" 326 U.S. at 109 (emphasis added).

Of course, the same policy is at work in this instance. Petitioners seek to hang the false epithet of "procedure" on a *forum non conveniens* decision so that they may obtain a different result in a state court a few blocks away. This amounts to a violation of the Congressionally mandated interest in uniform application of the general maritime law.

The legislative history of section 688(b) also demonstrates that Congress considered *forum non conveniens* a substantive matter. When discussing U.S. treaty obligations, Congress noted that provisions in treaties granting foreign nationals "access" to the courts of the United States do not define substantive rights:

> The courts have generally found that the substantive rights granted by the Jones Act do not extend to foreign nationals who lack sufficient contacts with the United States. ... [Section 688(b)] codifies this case law and clarifies that the substantive rights granted by the Jones Act do not extend to foreign offshore workers.

H. R. REP. 97-863, *supra* at 7.

Therefore, while Petitioners assert the "procedure" versus "substance" argument here to avoid the effect of a federal court

decision, this Court has determined that these labels are not significant. What is significant are the policies underlying the *Erie* and reverse-*Erie* doctrines. These policies, the discouragement of forum shopping and avoidance of inequitable administration of laws, were both factors that Congress considered in passing a statute to deal with the exact situation presented in this appeal. This Court should not overlook the policy considerations, and the valuable guidance provided by Congress in passing section 688(b).

CONCLUSION

Although it does not control the outcome of this litigation, there is a very real danger that a reversal by this Court of the Fifth Circuit's ruling on the basis of arguments presented by Petitioners could undercut the effectiveness of section 688(b). Petitioners' theory that a federal court *forum non conveniens* dismissal is merely procedural and therefore not binding on state courts under the reverse-*Erie* doctrine could easily be applied to avoid the effect of section 688(b) in future state court cases. If this Court reverses the Fifth Circuit on that basis, plaintiffs might be able to avoid the prohibitions of section 688(b) by simply walking down the street to a state court, in direct violation of Congressional intent. In enacting section 688(b), Congress exercised its plenary authority over the general maritime law and foreign relations. Although not bound by the enactment in this particular case, this Court should look to section 688(b) as an expression of Congressional policy in this purely Federal arena. The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

By _____
Eugene J. Silva
John M. Maciejczyk
2506 First City Tower
1001 Fannin
Houston, Texas 77002-6760
713/651-2014

Attorneys for Amici Curiae

OF COUNSEL:

VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
713/651-2222

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the above and foregoing brief by mailing them by certified mail, return receipt requested to Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., 609 Fannin, Suite 517, Houston, Texas 77002 and to James Patrick Cooney, Royston, Rayzor, Vickery & Williams, 2200 Texas Commerce Tower, Houston, Texas 77002.

_____
Eugene J. Silva